Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-565

LOCAL UNION NO. 513 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Petitioner,

v.

EDWARD L. VANDEVENTER, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Local Union No. 513 of the International Union of Operating Engineers, AFL-CIO, your Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled cause on July 5, 1978.

OPINIONS BELOW

The opinion of the Court below (App. A., infra, A-1-A-13) is reported at — F.2d —, 98 LRRM 3120. The judgment of the District Court (App. C., infra, A-16, R24-25)[1] is not reported.

[1] The symbol "R" refers to the appendix to petitioner's brief in the Court below. The appendix consists of one volume separately printed, and petitioner shall request certification of the record by the clerk of the court possessing it.

JURISDICTION

The judgment of the Court below (App. B., infra, A-14-A-15) was entered on July 5, 1978. The hour of entry of the judgment was not noted on the record of the Court below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner, a labor organization, maintains a system for referral of applicants for employment as construction equipment operators to employers requesting such referral. The referral system is maintained pursuant to a collective bargaining agreement between Petitioner and various employers. Respondent is a member of the union and was registered as a referral applicant.

Jurisdiction was invoked by Respondent in his complaint in the District Court under Section 102 of the Labor-Management Reporting and Disclosure Act, (LMRDA), 29 U.S.C. 412.

Respondent's complaint alleged violation of Section 101(a)(5) of LMRDA in that the union had discriminated against him in employment by failing and refusing to refer him to jobs because of his intra-union political activities and that he had been denied charges and hearing on the failure of employment referral.

Petitioner moved the District Court for dismissal of the complaint on the ground that the matter complained of by Respondent constituted an unfair labor practice under Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158(b) and was within the sole and exclusive jurisdiction of the National Labor Relations Board. The District Court denied Petitioner's motion and held a trial by jury of the case. The jury returned a verdict in favor of Respondent, and the District Court entered judgment thereon for damages and punitive damages. (App. C., infra, A-15). The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court holding that Respondent's complaint and proof stated an unfair labor practice under the National Labor Relations Act and that the federal courts have concurrent jurisdiction with the National Labor Relations Board over discrimination in employment (App. A., pp. A-1-A-13). The questions presented are:

1. Whether the Court below erred in holding that the national labor policy as enunciated by the Congress permits federal courts to exercise concurrent jurisdiction with the National Labor Relations Board over a cause of action based solely upon employment discrimination which constitutes an unfair labor practice under the National Labor Relations Act.

2. Whether the Court below erred in holding that a complaint of employment discrimination constituting an unfair labor practice under the National Labor Relations Act is subject both to the jurisdiction of the National Labor Relations Board and to the jurisdiction of the federal courts under Labor-Management Reporting and Disclosure Act and that the complainant may elect the forum for adjudication.

PERTINENT STATUTORY PROVISIONS

The statutory provisions relevant to the consideration of this cause are:

Section 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 412, states:

> Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the

district where the alleged violation occurred, or where the principal office of such labor organization is located.

Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 411(a)(5) states:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Section 8(b)(1) and (2) of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. 158(b)(1) and (2) provide:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

STATEMENT

A. The Facts

Petitioner union maintains a system of referral of applicants for employment as construction equipment operators under its collective bargaining agreement with employers. The union dispatches employment applicants upon requests of employers for operating engineers (R. 21-23).

The collective bargaining agreement of Petitioner contained the following provision with respect to complaints over employment referrals (Ptf. Exh. 5, Pg. 17, Sec. 3.08):

> "Section 3 08. Grievances: All disputes, differences and disagreements which may hereafter arise between the parties with respect to this Article, or between the parties and any person seeking registration and referral, shall be determined, resolved and finally disposed of under the grievance and arbitration provisions of this contract. No persons shall be denied access to said procedures because of membership or non-membership in this or any other Union or because he is not employed by an Employer obligated thereto."

Respondent has been a member of the union since 1963 and is qualified to operate certain types of construction equipment (R. 59-60). Respondent was registered with the union as an applicant for employment. On three separate occasions during 1974 and 1975, Respondent made inquiry of union officials concerning their failure to dispatch him to jobs and with regard to his position on the list of referral applicants (R. 75-77, 79).

Respondent had actively engaged in campaigning on behalf of candidates for union office during the summer of 1974. The candidates supported by Respondent were defeated in the elec-

tion which was held in August, 1974. On May 25, 1976, Respondent filed a complaint in this cause in the District Court alleging violation of Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act by the union for "not referring [Respondent] to jobs to which he should have been referred" (R. 6, Complaint, Para. 5) and alleging that the denial of employment referral was intended as discipline by the Union for his intra-union political activities.

B. **The Judgment of the District Court**

Petitioner moved for dismissal of the complaint in the District Court on the ground, *inter alia,* that the subject matter thereof was within the exclusive jurisdiction of the National Labor Relations Board. (R. 8-9). The District Court on October 10, 1976 denied the motion for dismissal (R. 10-18). Petitioner filed an answer reasserting its denial of jurisdiction. (R. 18-20).

Trial by jury was held in the District Court commencing on February 28, 1977 and on March 2, 1977, the jury returned a verdict in favor of Respondent in the sum of $25,000 actual damages and $10,000 as punitive damages. (R. 278). Petitioner, by oral motions at the close of Respondent's case in chief and again at the close of all the evidence, moved that Petitioner be granted a directed verdict in its favor and that the complaint be dismissed for want of jurisdiction. The motions were taken under submission by the District Court and were denied. Judgment was entered on March 2, 1977, (App. C, infra. A-16).

Petitioner filed its motion for judgment not withstanding the verdict or, in the alternative, for a new trial on March 7, 1977. The motion was denied without opinion on April 13, 1977, (R. 27).

C. **Holding Below**

The Court below found that Petitioner had discriminated against Respondent in violation of the National Labor Relations Act and held that the Congress intended that the federal courts have concurrent jurisdiction under the Labor-Management Reporting and Disclosure Act with the National Labor Relations Board over unfair labor cases involving discrimination in employment by labor organizations.

The Court below affirmed the judgment of the District Court on July 5, 1978. (App. A, A-1-A-13).[2]

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[2] A Cross Appeal was filed by Respondent concerning the denial by the District Court of his motion for attorney's fees. The Court below reversed and remanded that matter.

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals for the Eighth Circuit in this cause undermines the national labor policy as declared by the Congress of the United States and disregards and misinterprets the decisions of the Supreme Court of the United States in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236; *Local 100, Plumbers v. Borden*, 373 U.S. 690 and *Farmer v. United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 390.

The Court of Appeals asserted that (App. A-9):

> "The legislative history of the LMRDA also leads us to reject a primary premise of the Union's argument; that the LMRDA protects only *membership* rights, not *employment* rights."

and reached the following conclusion (App. A-9):

> "Thus, Congress reaffirmed its understanding that the LMRDA would afford remedies in federal courts for conduct already within the jurisdiction of the NLRB under provisions of the National Labor Relations Act."

As a basis for its conclusion that the federal courts have concurrent jurisdiction with the National Labor Relations Board (App. A-8), the Court below cited a portion of the legislative history in the House of Representatives of amendments to the provision that became 29 U.S.C. § 529, which the Court below held to be "almost identical" with Section 411 of LMRDA, reported at 105 Cong. Rec. 1309, (duly ed. July 27, 1959); II Leg. Hist. 1522, reading (App., A-9):

> In our judgment, the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act and, accordingly, we do not believe that criminal sanctions are warranted.

The cited fragment of legislative history reflects consideration of union discipline proscribed by Section 609 of LMRDA, 29 U.S.C. 529 with unfair labor practices proscribed by Section 8(b) of NLRA and equated these divergent statutory provisions as comparable only in that neither warranted criminal sanctions. The cited legislative fragment neither proposed to subject internal union discipline to the jurisdiction of the NLRA nor to grant federal courts concurrent jurisdiction with the NLRB over unfair labor practices resulting from employment discrimination.

Congress in enacting the National Labor Relations Act provided a forum for adjudication of unfair labor discrimination relating to employment. Congress in enacting the Labor-Management Reporting and Disclosure Act accorded jurisdiction in Title I thereof to the federal courts over suits for denial by a a labor organization of enumerated rights of members in the conduct of its internal affairs.

Where a suit is brought in federal or state court alleging denial by a labor organization of rights to its members in the conduct of its internal affairs, the court upon finding denial of membership rights may fashion a remedy for such denial, including damages for loss of income, loss of pension, mental anguish and other consequences, *International Association v. Gonzales*, 356 U.S. 617; *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233.

But where a suit alleges failure of referral and consequent discrimination in employment by reason of a member's internal union conduct, the basis of the suit is discrimination in employment and hence falls within the exclusive jurisdiction of the National Labor Relations Board. *Local 100, Plumbers v. Borden*, 373 U.S. 690; *San Diego Building Trades Council v. Garmon*, 359 U.S. 236; *Farmer v. United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 390.

The complaint of Respondent in this cause is identical with the complaint in *Local 100, Plumbers v. Borden, supra*, and

alleges denial of referral for employment by reason of his internal union conduct. As this Court declared in *Farmer, supra,* in discussing *Borden,* "Under these circumstances, concurrent state court jurisdiction would have impaired significantly the functioning of the federal system." (*Farmer, supra,* at Footnote 9).

The holding of the Court below results in a serious conflict between the courts and the National Labor Relations Board over the same unfair labor practice issue involving employment discrimination. Two forums for the same cause of action in the labor field thereby result. Such an occurrence is in derogation of the intent of Congress and of the holdings of this Court as enunciated in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236.

The Court of Appeals for the Eighth Circuit has inserted judicial supervision in an area which has been reserved to the exclusive competence of the National Labor Relations Board by the Congress. *Farmer v. United Brotherhood of Carpenters and Joiners of America,* 430 U.S. 390; *Vaca v. Sipes,* 386 U.S. 171. This Court in *Farmer, supra,* recognized that a complaint may be bifurcated so that its allegations relating to interference with employment are not actionable by the state or federal courts but its allegations pertaining to matters outside the scheme of the national labor policy may be entertained by the courts. *United Automobile Workers v. Russell,* 356 U.S. 634; *United Workers v. Laburnum,* 347 U.S. 656. Respondent's complaint does not meet the test of *Farmer, supra,* by reason that Respondent's cause of action relates only to employment discrimination and may not be bifurcated so that any part may remain within the jurisdiction of the federal courts.

The holding of the court below impairs the national labor policy by permitting concurrent jurisdiction in unfair labor practice matters which shall disrupt the complex relationship between employees, employers and unions. *Farmer v. Carpenters,*

supra; *Local 100, Plumbers v. Borden,* supra; San Diego Bldg. Trades Council v. Garmon, supra.

The holding of the Court below is in derogation of the natural labor policy as enunciated by the Congress of the United States and by this Court. Petitioner submits that the Court below is in error in its holding that concurrent jurisdiction in unfair labor practice cases exists in the federal courts and the National Labor Relations Board. The decision of the court below is inconsistent with the development of a sound body of federal law under the National Labor Relations Act.

CONCLUSION

Upon all the reasons set forth herein, Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 77-1503
No. 77-1562

Edward L. Vandeventer, Jr.,
Appellee,

v.

Local Union No. 513 of the International Union of Operating Engineers, AFL-CIO,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January 10, 1978

Filed: July 5, 1978

Before BRIGHT, STEPHENSON, and HENLEY, Circuit Judges.

BRIGHT, Circuit Judge.

Edward L. Vandeventer, a member of Local Union No. 513 of the International Union of Operating Engineers, AFL-CIO (the Union), brought an action against the Union alleging that he had been disciplined without being afforded the procedural protections required by section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29

U.S.C. § 411(a)(5) (1970).[1] Jurisdiction rests on 29 U.S.C. § 412 (1970).[2] The district court[3] entered judgment in accordance with a jury verdict awarding Vandeventer $25,000 actual damages and $10,000 punitive damages. The Union appeals the judgment, urging as error the district court's denial of its motion for judgment n.o.v. or new trial (No. 77-1503). Vandeventer cross-appeals, alleging error in the district court's denial of his request for attorney's fees (No. 77-1562). We remand the issue of attorney's fees to the district court for further consideration. On all other issues, we affirm.

I. **Background.**

The Union maintains a hiring hall system for referring workers to jobs. A contractor requiring an operating engineer to operate construction machinery notifies the Union. The Union then dispatches members who are qualified and available, first preference being given to those who have been out of work for the longest period of time.

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[1] Section 411(a)(5) provides as follows:

Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

[2] Section 412 provides as follows:

Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

[3] The Honorable Roy W. Harper, United States District Judge for the Eastern District of Missouri, presiding.

Vandeventer has been a member in good standing since 1963 and is qualified to operate various types of construction equipment. Although he registered with the Union's hiring hall, Vandeventer's availability for work may have been limited at times because he had expressed a preference for work at only one work site and, in addition, ran a bus company.

Prior to September 1974, Vandeventer worked an average of 133 hours per month; after that date, he averaged only 9 hours per month. In November 1974, he complained to the union job dispatcher, Jack Sawyer, that he was not in the right place in the out-of-work list. Vandeventer was listed as number 85 in order of preference and he believed he should have been listed at number 20. Sawyer told him, "if I [Vandeventer] didn't like it to go see somebody higher than him."

Vandeventer then contacted Wayne Hopkins, president of the Union, who stated that he would take care of the matter. Hopkins, however, did nothing for Vandeventer.

In February 1975, Vandeventer again complained to Sawyer about his position on the list. The list posted on February 3 did not contain his name; on the February 10 list, he was number 4; on the February 14 list he was not listed; and on February 26, he was listed as number 263, near the bottom of the list. On Sawyer's suggestion, Vandeventer again talked to Hopkins. Vandeventer described the conversation:

> I asked him why I was removed from the list, that "Mr. Sawyer suggested that I talk to you," and I pointed out to him that I had always been a good union member and I asked him if there was any reason why I was being disciplined or being removed off the list and why I wasn't being sent to any jobs. And I asked him if, well, you know, he said, "We are not disciplining you." And I asked him if I should write anything out in writing, make a written com-

plaint. He said, "Don't worry about it. We'll take care of the matter."

Vandeventer's name again disappeared from the list between April 10 and May 16. When he talked to Sawyer about this matter, Sawyer told him "that he had a special list for people, for certain people." Vandeventer again conferred with the president of the Union:

> I again asked him at this time what had happened, if I had did anything wrong to be treated like this and he didn't have any specific answer. And I asked him again if there was anything, any formal complaint that I could write out to take care of this problem because I wasn't being treated fairly.
>
> * * * Again he told me that I didn't need to write anything out and he would take care of the matter.

Vandeventer believed the Union leadership was deliberately discriminating against him as a method of discipline for past intraunion political activities. In an election held in August 1974, just prior to the time he began having problems with his position on the out-of-work list, Vandeventer had actively supported a slate of candidates opposing the slate headed by Hopkins. Vandeventer's candidates lost the election. He attributed his low position on the job referral list to retribution for those activities.

In August of 1975, Vandeventer attempted to present his complaint of improper discipline, along with evidence of the alleged discriminatory practices, to Leo Beshinski, the Union's international vice president. When Vandeventer was on his way to the meeting, however, an unknown person struck him from behind. He was hospitalized for two weeks and unable to work for three months due to the injuries.

Vandeventer brought this action in May of 1976, alleging that the Union had taken disciplinary action against him without providing him with written charges and a hearing, in violation of 29 U.S.C. § 411(a)(5), that the disciplinary action "consisted of defendant not referring plaintiff to jobs to which he should have been referred," and that the Union's actions were maliciously motivated and resulted from Vandeventer's political activities. Vandeventer alleged that he has lost wages and fringe benefits as a result of the Union's actions, and he sought actual and punitive damages, costs, and attorney's fees.

II. **Preemption.**

In district court, the Union moved to dismiss the complaint on the following grounds, *inter alia:*

> The matters complained of by Plaintiff fall within the purview of and are preempted by Section 8(b) of the National Labor Relations Act and this Court is without jurisdiction to entertain the complaint of Plaintiff.

The Union raised the same argument in a post-trial motion for judgment n.o.v. or a new trial. The district court denied both motions. The Union now raises the preemption issue on appeal. We agree with the ruling of the district court.

The Union makes the following argument. In his complaint, Vandeventer charged the Union with discrimination in job referrals. Discrimination in job referrals is an unfair labor practice that falls within the jurisdiction of the National Labor Relations Board (NLRB), *Farmers v. United Brotherhood of Carpenters & Joiners of America,* 430 U.S. 290, 303 nn.11 and 12 (1977), and the NLRB has exercised jurisdiction over such charges, *see e.g., Boilermakers Local Union No. 83, AFL-CIO,* 205 NLRB No. 154 (1973). The federal courts, as well as the state courts, must defer to the exclusive compe-

tence of the NLRB with regard to activities that are arguably subject to the National Labor Relations Act. *Vaca v. Sipes*, 386 U.S. 171, 179 (1967); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). Vandeventer's complaint is therefore preempted by the NLRB, and the district court lacks jurisdiction.

We reject the Union's argument for it misconstrues both the preemption doctrine and the LMRDA. The purpose of the preemption doctrine is to protect a uniform national labor relations policy from interference by state and federal courts. *San Diego Building Trades Council v. Garmon, supra*, 359 U.S. at 241-48. That national policy is established in the first instance by Congress. The preemption doctrine therefore rests on congressional intent. *See Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, No. 76-750, slip op. at 7 n.12 (U.S. May 15, 1978). Congress may originally have intended that the NLRB exercise exclusive jurisdiction over charges of discrimination in job referrals, whether for discipline or other purposes. In enacting the LMRDA in 1959, however, Congress expressed a clear intention to grant federal courts jurisdiction over claims of improper union discipline of members, thereby superseding the exclusive jurisdiction of the NLRB. *Cf. Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, supra*, slip op. at 8 n.14 (Congress has created numerous exceptions to the Board's exclusive jurisdiction). Thus, the grant of federal court jurisdiction contained in 29 U.S.C. § 412 overrides the preemption doctrine. *See* Beaird and Player, *Union Discipline of Its Membership Under Section 101(a)(5) of the Landrum-Griffin: What is "Discipline" and How Much Process is Due?* 9 Ga. L.Rev. 383, 385-86 (1975); Etelson and Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 Harv. L.Rev. 727, 754-55 (1969).

The legislative history of the LMRDA demonstrates that Congress expressly intended the NLRB and the federal courts

to exercise concurrent jurisdiction over cases such as the one before us.

We find the first legislative indication of concurrent jurisdiction in the proceedings leading to the adoption of an amendment to section 411(a)(4).[4] Under that section as enacted, a union may require a member to exhaust intraunion remedies before instituting an action in court or before an administrative agency. That requirement, however, binds the member for only four months. In other words, after seeking a remedy through the union for four months, the member, if unsuccessful, may then institute legal or administrative proceedings. The original bill passed by the Senate (S.1555), required a member to seek a remedy through union procedures for *six* months. Senator Goldwater criticized this provision, pointing out that the Taft-Hartley Amendment to the National Labor Relations Act imposed a six-month statute of limitations on unfair labor practice charges. If intraunion procedures lasted six months or longer, an aggrieved member would be unable to file charges with the NLRB.[5] The House version of this section reduced the six-month period to four months for the express purpose of enabling an aggrieved member to pursue remedies before the NLRB.[6] The Senate agreed to this amendment.

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[4] Section 411(a)(4) provides in relevant part:

Protection of the right to sue. No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, * * * Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings * * *.

[5] 105 Cong. Rec. 6847 (daily ed. May 7, 1959), *reprinted in* II NLRB, *Legislative History of the Labor-Management Reporting and Disclosures Act of 1959*, 1270 (1959) [hereinafter cited as "*Leg. Hist.*"].

[6] 105 Cong. Rec. 13089 (daily ed. July 27, 1959), II *Leg. Hist.* 1520.

This history of section 411 indicates that Congress intended union members to have remedies before both the federal courts and the NLRB. This history contains no suggestion that the member must first resort to the NLRB in such a case. Indeed, such a requirement would be contrary to the purpose of section 412, which provides a remedy in federal court.

The second indicator of concurrent jurisdiction is disclosed by amendments to the provision that became 29 U.S.C. § 529. Because the language of section 529 is almost identical to that of section 411, its legislative history is relevant to interpreting section 411 as well. Originally passed by the Senate as section 607 of S. 1555, this provision imposed criminal penalties for a variety of union actions, including improper discipline and use of force or violence.[7] The House version, which ultimately became law, retained criminal penalties for the use of force or violence but imposed only civil penalties for improper discipline. The House reasoned as follows:

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[7] Section 607 in S. 1555 read as follows:

> Sec. 607. (a) It shall be unlawful for any labor organization, its officers, agents, representatives, or employees, to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act.
>
> (b) It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, or by economic reprisal or threat thereof, to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercising by such member of any right to which he is entitled under the provisions of this Act.
>
> (c) Any person who shall willfully violate the provisions of this section, shall be fined not more than $10,000 or imprisoned for not more than two years, or both. [*Leg. Hist.* 575-76.]

The House version divided § 607 into two sections now codified at 29 U.S.C. §§ 529, 530. Section 529 contains the same language as § 607(a), with the addition of one sentence: "The provisions of section 412 shall be applicable in the enforcement of this section."

> In our judgment, the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act and, accordingly, we do not believe that criminal sanctions are warranted. [105 Cong. Rec. 13091 (daily ed. July 27, 1959), II *Leg. Hist.* 1522.]

Thus, Congress reaffirmed its understanding that the LMRDA would afford remedies in federal court for conduct already within the jurisdiction of the NLRB under provisions of the National Labor Relations Act.

The legislative history of the LMRDA also leads us to reject a primary premise of the Union's argument: that the LMRDA protects only *membership* rights, not *employment* rights. While the LMRDA was intended to govern only internal union affairs, Congress recognized that interference with employment rights constituted a powerful tool by which union leaders could control union affairs, often in violation of workers' membership rights. The congressional debates illustrate some of the abuses Congress sought to curb:

> They are afraid of reprisals against them. Two waitresses from Chicago testified that it required 6 months to get a job. [105 Cong. Rec. 5811 (daily ed. Apr. 22, 1959), II *Leg. Hist.* at 1103 (comments of Sen. McClellan).]
>
> * * * *
>
> There is a great deal more involved than a $10 fine, if union officials can expel a member from the lodge and keep him from working. [*Id.*]
>
> * * * *
>
> While this aggrieved member is exhausting the remedies provided by the laws of the national organization * * * he has lost his home, and his children, if any, are approaching

> starvation. If he lives in a community that is well organized he cannot possibly get employment while pursuing the rather devious processes by which he might exhaust the remedies available to him under these bills[.] [105 Cong. Rec. 14337 (daily ed. Aug. 12, 1959), II *Leg. Hist.* at 1613 (comments of Rep. Loser).]

Because Congress recognized the close relationship between membership rights and employment rights, we believe that Congress did not intend to draw a strict distinction between the two in enforcement of rights protected by the LMRDA.

The circumstances of the instant case give rise to a more specific question: whether discrimination in job referrals (a particular type of violation of employment rights) can constitute discipline (a particular type of violation of membership rights) under section 411(a)(5). Courts and commentators have disagreed on the answer to this question. *See* Beaird and Player, *supra*, 9 Ga. L.Rev. at 392-93; Etelson and Smith, *supra*, 82 Harv. L.Rev. at 732-33. We need not decide the question in the present case, however, because the Union has not raised the issue on appeal. In fact, in district court, the Union offered, and the court accepted, the following jury instruction:

> "Discipline" in these instructions refers to the intentional failure and refusal of Local 513 to refer plaintiff to jobs he was qualified to perform for the purpose of punishing plaintiff for his inter-union activities.

Thus, the Union conceded the jury might determine that discrimination in job referrals in this case constituted discipline under the LMRDA.

We conclude that the district court properly rejected the preemption argument upon which the Union's motions for dismissal and judgment n.o.v. rested.

III. **Exhaustion.**

In its motion for judgment n.o.v. or a new trial, the Union argued that Vandeventer failed to exhaust his intra-union remedies. The district court denied the motion, and the Union raises the same issue on appeal. The LMRDA authorizes unions to require members "to exhaust reasonable hearing procedures" within the union before instituting legal or administrative proceedings. 29 U.S.C. § 411(a)(4). The Union's constitution, in art. XXIII, subdiv. 7, section (m), p. 105, sets forth elaborate procedures by which a member or officer (the "complainant") files charges against a member (the "defendant") and a trial is conducted before discipline is imposed on the defendant. We find no description of procedures by which a member such as Vandeventer, who suspects that he is subject of wrongful disciplinary action, can bring charges or initiate an inquiry. In fact, Vandeventer twice asked Hopkins, the union president, whether he could file such a charge, and in both instances Hopkins said he could not. We conclude that the Union has established no procedures for Vandeventer to exhaust and that the district court properly denied the Union's motion.

IV. **Sufficiency of the Evidence.**

The Union contends that the evidence was insufficient to support the jury verdict, including the award of punitive damages. Although Vandeventer's case rested primarily on circumstantial evidence, we find sufficient evidence to support the jury's finding under the instructions that the Union had taken disciplinary action against him. This determination also furnishes an adequate basis for the jury to have concluded that the Union officials acted maliciously, thereby justifying the award of punitive damages. *See International Brotherhood of Boilermakers v. Braswell*, 388 F.2d 193, 199 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968). The Union did not object to the jury instruction

on punitive damages.[8] Under the circumstances of this case, the decision whether to award punitive damages rested with the jury, and adequate evidence supported its conclusion. We therefore reject the Union's argument.

V. **Attorney's Fees.**

In his complaint, Vandeventer requested attorney's fees along with other forms of relief. After the jury had returned its verdict, Vandeventer's counsel filed a motion for allowance of attorney's fees, along with a detailed list of time spent in preparing the case. The court denied the motion on the following ground:

> While the plaintiff in his petition sought attorney's fees, no proof was offered during the jury trial with respect to attorney's fees, nor did the plaintiff request the Court to give any instruction with respect to attorney's fees.

On cross-appeal, Vandeventer contends that the district court erred in denying the motion.

The power to award attorney's fees in LMRDA actions arises from the traditional equitable power of federal courts

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[8] The district court instructed the jury:

> If the jury should find from a preponderance of the evidence in this case that plaintiff Edward L. Vandeventer, Jr. is entitled to a verdict for actual damages, and you should further find that the acts or omissions of the defendant Local Union 513, which proximately caused actual injury or damage to the plaintiff, Edward L. Vandeventer, Jr. were maliciously done, then the jury may, if in the exercise of discretion unanimously chose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper as punitive damages.
>
> An act or failure to act is maliciously done if prompted or accompanied by ill will or spite or grudge either toward the injured person individually or toward all persons in one or more groups or categories of which the injured person is a member.

to award such fees whn the interest of justice so requires and from the language of 29 U.S.C. § 412, which broadly authorizes the court to grant "such relief * * * as may be appropriate." *Hall v. Cole*, 412 U.S. 1, 5, 10-11 (1973). That power rests with the district court, to be exercised in its discretion. The district court here erred in concluding that the question of attorney's fees must be decided by the jury.

We express no opinion on whether Vandeventer is entitled to attorney's fees. Instead, we remand to the district court to determine this issue under the principles enunciated in *Hall v. Cole, supra.*

We affirm, but remand for further consideration on the question of attorney's fees.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

(Filed August 1, 1978)

United States Court of Appeals
for the Eighth Circuit

No. 77-1503 September Term, 1977

Edward L. Vandeventer, Jr.,
Appellee,

vs.

Local Union No. 513 of the International Union of
Operating Engineers, AFL-CIO,
Appellant.

No. 77-1562

Edward L. Vandeventer, Jr.,
Appellant,

vs.

Local Union No. 513 of the International Union of
Operating Engineers, AFL-CIO,
Appellee.

Judgment

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District

Court, in this cause, be, and the same is hereby, affirmed on all issues with the exception of attorney's fees.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for further considerations on the issue of attorney's fees in accordance with the opinion of this Court.

July 5, 1978

(See attached sheet for cost information.)

A true copy: ROBERT C. TUCKER

Attest:

Clerk, U. S. Court of Appeals, 8th Circuit.

July 31, 1978

APPENDIX C

In the United States District Court
Eastern District of Missouri
Eastern Division

Edward L. Vandeventer, Jr.,
Plaintiff,

vs.

Local Union No. 513 of the International Union of Operating Engineers, AFL-CIO,
Defendant.

No. 76-473C (A)

Judgment

(Filed in U. S. District Court March 3, 1977)

This action came on for trial before the Court and a jury, Honorable Roy W. Harper, District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict;

IT IS ORDERED AND ADJUDGED that the plaintiff recover of the defendant the sum of twenty-five thousand ($25,000.) dollars actual damage with interest thereon at the rate of 6% per annum and costs.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff recover of the defendant the sum of ten thousand ($10,000.) dollars punitive damages with interest thereon at the rate of 6% per annum and costs.

WILLIAM D. RUND, Clerk
By /s/ EDITH B. SCHERRER
Deputy Clerk

Dated this 2nd day of March, 1977.